No. 2562

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

SAMUEL W. BACKUS, as Commissioner of Immigration at the Port of San Francisco,
Appellant,

vs.

YEP KIM YUEN,
Appellee.

REPLY BRIEF FOR APPELLANT.

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At the outset the appellant finds it necessary to challenge the correctness of various statements appearing throughout the appellee's brief that deal with the facts. It is stated on page 2:

> After a consideration of the evidence, the Commissioner of Immigration at the Port of San Francisco, decided that the father's claim of citizenship was good, from which position he never afterwards retreated * * *."

On page 3:

> "Upon consideration of this evidence, the Commissioner, * * *, did again determine and find that the father was the same Yep

> Lung Gon who was adjudged a citizen in 1890, that is to say, he did not alter his original judgment in favor of the father."

On page 12:

> "In the case at bar, the Commissioner of Immigration at the Port of San Francisco and the examining inspector were satisfied with the identity of the applicant's father."

On the contrary, it appears from the immigration records in evidence that, although the father was landed in 1898 and again in 1913 because of the opinion expressed in 1898 by a Chinese inspector that he was the person represented by the tin-type photograph in District Court record No. 9071, which person was discharged by the Court in 1890 as a native born citizen of the United States, on the occasion of the father's applying in 1912 for a certificate that would entitle him to go to China and return to this country as a citizen, the Commissioner of Immigration, the Assistant Commissioner of Immigration, the reviewing inspector of the law section and the investigating inspector, all of whom had made a careful comparison of the father personally with a photographic copy of the tin-type photograph in the Court record, were unanimously of the opinion that he was not the person represented by the photograph. In his memorandum in that case, dated July 22, 1912, the said reviewing inspector of the law section, after reciting how the Commissioner, the As-

sistant Commissioner and he had made the comparison just referred to, stated as follows:

> "* * * were it not for the fact that this applicant [father] has been twice landed as the person discharged as shown by the said court record, we would have been disposed to deny the application on the ground that the applicant is not the person discharged by the court."

As was pointed out in the appellant's opening brief (p. 4) when the case first came to the office of the Secretary of Labor on appeal from the excluding decision of the Commissioner of Immigration, entered upon the ground that the question of relationship had not been satisfactorily proved, Acting Secretary Post passed upon the case as follows:

> "The question of the identity of the father with the person of same name decided in 1890 to be an American citizen, appears to be the decisive one in this case. As appellant has not yet had his 'day in court' on that question, the case is reopened for proof of identity.
>
> In the absence of such proof after reasonable opportunity to produce it, exclude."

The appellee in his brief (p. 20) interprets the concluding sentence to mean that if such proof was produced the Commissioner of Immigration should land the applicant without again referring the case to the Department. The correct interpretation is clearly this: the Acting Secretary disposed of the case upon the record before him, ordering the exclusion of the applicant on condition that no evi-

dence of identity was produced after reasonable opportunity for its production was given, but in the event that such evidence was produced he wanted to pass upon it as an appeal matter. This interpretation is borne out by the letter of December 1, 1913, addressed to the Commissioner at San Francisco by the Acting Commissioner-General, which instructed the Commissioner to forward the additional evidence submitted on rehearing to the Bureau of Immigration (immigration record Yep Kim Yuen case). This point was evidently made by the appellee upon the assumption that had it been left with the Commissioner of Immigration to pass upon the evidence of identity afterwards produced, he would have landed the applicant. This assumption is by no means justified, as appears from the opening paragraph of this brief, and from the fact that the Commissioner of Immigration never expressed an opinion contrary to that shown therein to have been held by him.

In his brief (pp. 4 and 5) appellee refers to the supplemental memorandum dated February 14, 1914, of Acting Commissioner-General Larned, which was prepared after evidence had been submitted on the question of identity pursuant to Acting Secretary Post's memorandum above quoted, and which may be found set out in full in appellant's opening brief (pp. 5 to 7 inclusive), stating "Nowhere in the records, exhibits, or the transcript does it appear that any further action was taken on the Acting Commissioner-General's recommenda-

tion by the Secretary of Labor". To meet this statement effectually, it is only necessary to point to the notation "Approved, J. B. D." (J. B. D. being the initials of J. B. Densmore well known by the Court below and counsel to have been vested at the time in question with authority to perform the duties of the Secretary of Labor in the absence of the Secretary and Assistant Secretary) at the foot of the said supplemental memorandum of the Acting Commissioner-General, and to refer, by way of confirmation of the claim of the appellant that the notation just pointed out and quoted signifies that J. B. Densmore, as Acting Secretary, took action upon the said supplemental memorandum of the Acting Commissioner-General by approving the same, to page 76 of the immigration record in the case of Yep Kim Yuen, which is a copy of a letter dated February 20, 1914, signed by F. H. Larned, Acting Commissioner-General of Immigration, addressed and mailed to the Commissioner of immigration, San Francisco, Cal., the body of which reads as follows:

> "The Bureau acknowledges the receipt of your letter of the 6th instant, No. 12916/4, transmitting record of the additional investigation in the case of Yep Kim Yuen.
>
> After carefully considering the evidence presented in the entire record, the Acting Secretary has affirmed your excluding decision."

Appellee contends (pp. 23 and 24 his brief) that the said supplemental memorandum of the Acting

Commissioner-General shows, from a passage quoted therefrom, that the recommendation therein that Yep Kim Yuen be deported, was based upon a misunderstanding, on the part of the Acting Commissioner-General that Acting Secretary Post meant, in passing upon the case as above quoted, to require that evidence *de novo* be produced of the birth of the father of Yep Kim Yuen in the United States, instead of simply requiring that evidence be produced of his identity with the Yep Lung Gon discharged by the Court. That no such misunderstanding existed is readily apparent from the following sentence taken from near the beginning of the said supplemental memorandum of the Acting Commissioner-General:

> "At the suggestion of the Acting Secretary (Mr. Post) the case was returned to the San Francisco office in order that the alleged father might have a further opportunity to establish his citizenship by the submission of evidence showing his identity with the person (whom he claims to be) discharged on habeas corpus proceedings as a citizen by the District Court at San Francisco on January 9, 1890 (court record No. 9071)."

Appellee complains (pp. 5 and 6 his brief) that it does not appear that the desire of his Washington attorney, Mr. Wolf, noted at the foot of the said supplemental memorandum of the Acting Commissioner-General, and shown to have been made after the appeal was finally decided by the approval of the said supplemental memorandum by

"J. B. D." (J. B. Densmore, Acting Secretary), was granted. A reading of the immigration record cannot but impress one that Yep Kim Yuen and Mr. Wolf were shown every consideration by the Bureau of Immigration and the Department of Labor throughout the proceedings. This especially appears from the memorandum of "W. J. P." (pp. 7 and 8 appellant's opening brief), dated "2/17/1914", which evidently refers to what took place after the case was closed and after Mr. Wolf's request was made. There it is shown that although the case had been disposed of after a most thorough and painstaking investigation, and a most careful consideration of the evidence, the Department was still anxious "that there might be no possibility of mistake", and accordingly "W. J. P." went to the identification experts at the District of Columbia police headquarters with Mr. Wolf and secured their opinion upon the question of the identification of the father with the subject of the court record. Does not this indicate that Mr. Wolf in all probability had all the hearing he desired? When it is realized that Congress contemplated that these cases should be disposed of in as prompt and summary a manner as fairness would permit, the solicitude expressed in the "W. J. P." memorandum must be considered, to say the last, as unusual.

It is stated in various parts of appellee's brief that Yep Kim Yuen or his attorneys were not given an opportunity to rebut the opinion expressed by Chief Flynn of the Secret Service Division of the

Treasury Department, based upon a comparison of photographs of the father of Yep Kim Yuen and of the tin-type in the Court record, that they did not represent the same person. Presumably a general allegation in the petition (pages 4 and 5 of transcript) was intended to cover this claim of unfairness. No evidence has been offered in support of it, while pages 77 and 79 of the immigration record in Yep Kim Yuen's case shows that it is without foundation. There it appears that when the petition was filed the Commissioner of Immigration telegraphed as follows to the Bureau of Immigration:

> Appeal case Yep Kim Yuen, writ applied for one allegation being department considered evidence not in record here and gave no opportunity for rebutting same, meaning possibly opinion chief secret service if advisable forward department's record certified for production in court."

In sending this record requested in the said telegram the Acting Commissioner-General wrote as follows:

> "This case was, as the record will show, represented before the Department on appeal by local counsel at all stages, and he was afforded every opportunity to submit evidence in rebuttal of any contained in the record."

The appellant agrees with the appellee's statement (page 9 his brief) that the identity of the father, Yep Lung Gon, is the only disputed question between the appellee and the Secretary of Labor.

The appellee presents the question to be determined by this Court as follows (page 9 his brief):

> "Did the Secretary of Labor have the right to dispute the identity of the father of the applicant and, if so, did he dispute it and render his judgment thereon fairly, in good faith, and without abuse of discretion vested in him by law?"

As was contended in the appellant's opening brief, the Secretary had the right to dispute the identity of the father, for the reason that the question of identity was a question purely of fact, and, being a question of fact, the decision of the Secretary thereon was final and not reviewable by the courts, provided, of course, as is laid down in Low Wah Suey v. Backus, 225 U. S. 468, that the proceedings were not manifestly unfair and there was not a manifest abuse of discretion.

Appellant (pages 12, 13 and 14 opening brief) cited Ex parte Long Lock, 173 Fed. 208, as holding that this question of identity was one of fact. The appellee (pages 9 to 13 inclusive, his brief) furnishes us with another authority on this point, viz., United States v. Chin Len, 187 Fed. 544. In that case the court said that had there been evidence to support it, the immigration officials could properly have made a finding that Chin Len was not the person shown by the record to have been discharged by a United States Commissioner. In the absence of any evidence to support it, however, the court held that the finding of the immigration

officials that Chin Len was not the person so discharged, was arbitrary, and constituted an abuse of discretion. In the case of ex parte Long Lock, supra, it was held that a similar finding, based upon evidence by the immigration authorities was final. In the present case, inasmuch as a similar finding, also based upon evidence, was made, the appellant submits that it cannot be disturbed.

All that is now left for consideration is, was there manifest unfairness or manifest abuse of discretion?

That the investigation was most painstaking and thorough; that Yep Kim Yuen's attorneys were fully advised that the case turned on the question of identity; that they were afforded every opportunity to submit evidence in rebuttal of any contained in the record passed upon by the Acting Secretary; that all of the evidence favorable as well as unfavorable to the claim of identity was carefully weighed; and that the decision of the Acting Secretary was arrived at in the utmost good faith is obvious from a reading of the record of the immigration proceedings.

The evidence favorable to the claim of identity was as follows: that the father of Yep Kim Yuen lived in the United States as far back, approximately, as 1890; that on his return from his two visits to China since that time, one in 1898, and the other in 1913, he was on each occasion landed by the immigration authorities as an American born

citizen by reason of his claiming to have been the Yep Lung Gon shown by the before mentioned Court record to have been discharged as an American born citizen in 1890; and that Dr. John E. Gardner, Inspector and Chinese Interpreter of the Immigration Service, a recognized expert on Chinese handwriting, was of the opinion that the signature as it appeared in the Court record of the Yep Lung Gon discharged was the signature of the father. The evidence unfavorable to the claims of identity was as follows: that all of the immigration officers at the port of San Francisco, from the Commissioner down to the investigating inspector, who considered the question of identity when the father was an applicant for a return certificate in 1913, as well as in the present case, after comparing the father physically with a photographic copy of the tin type photograph of Yep Lung Gon in the Court record, concurred in the opinion that the father was not the person represented by the tin type; that all of the officials of the Department of Labor and the Bureau of Immigration at Washington, from the Acting Secretary down, who considered the case, after comparing photographs of the father with the photographic copy of the tin type in the Court record, concurred in that opinion; and that Chief Flynn of the Secret Service, after making the same comparison made in the Department of Labor and the Bureau of Immigration, also concurred in that opinion. After weighing this evidence for and against the claim, the Acting

Secretary finally came to the conclusion that the identity had not been satisfactorily established. Then, by way of confirmation, the two identification experts of the District of Columbia Police Department, after comparing the photographs of the father and the photograph of the tin type emphatically asserted that they could not possibly be photographs of the same person.

Surely, from this it is preposterous to say that there was a manifest or any abuse of discretion on the part of the Acting Secretary in deciding as he did. Therefore, the fact that the District Court, with the identical record before it that the Acting Secretary based his decision upon, came to a different conclusion did not justify the Court in assuming jurisdiction of the question of fact involved.

A suggestion entirely unsupported by evidence that a photograph other than that of Yep Lung Gon might possibly have found its way into the Court record in question through some carelessness in the clerk's office, was considered by the Acting Secretary and very properly dismissed.

Dated, San Francisco,
September 1, 1915.

Respectfully submitted,

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